

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ASARCO, INCORPORATED,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY, and STATE
OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondents.

PCHB No. 84-56

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a \$250 civil penalty for emissions allegedly in violation of respondent's Section 9.03(b) of Regulation I and WAC 173-400-040(1), came on for hearing before the Pollution Control Hearings Board; Gayle Rothrock, David Akana, and Lawrence J. Faulk, convened at Lacey, Washington, on April 26, 1984. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney Michael R. Thorp. Respondent

1 Puget Sound Air Pollution Control Agency appeared by its attorney
2 Keith D. McGoffin. Respondent Department of Ecology did not appear
3 but filed a written memorandum. Reporter Alison Fletcher recorded the
4 proceedings.

5 Witnesses were sworn and testified. Exhibits were examined. From
6 testimony heard and exhibits examined, the Pollution Control Hearings
7 Board makes these

8 FINDINGS OF FACT

9 I

10 Appellant, ASARCO, Incorporated, owns and operates a copper
11 smelter in Tacoma, Washington.

12 II

13 The process used to produce copper also produces a molten slag
14 within the smelting furnace. This is skimmed off and put into the
15 cars of a shuttle train. The train moves to a dumping area where the
16 molten slag is released to flow across the ground. When air cooled,
17 the slag hardens and is processed further.

18 III

19 On December 28, 1983, Puget Sound Air Pollution Control Agency's
20 (PSAPCA's) inspector, while on routine patrol, made a surveillance of
21 the slag dumping area. At 8:21 a.m., the slag train arrived with
22 seven cars, six of which discharged molten slag onto the dumping area.

23 IV

24 As the slag was poured, a blue-white smoke emission occurred. At
25 8:24 a.m. the inspector began recording the opacity of the smoke. The

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-56

1 inspector made his recordings from the adjacent property, a parking
2 lot for the Tacoma Yacht Club.

3 V

4 The inspector observed the smoke, while recording its opacity,
5 through the mesh of a green chain link fence which separated him from
6 ASARCO property. The sun was behind and to the right of his back. It
7 was mostly hidden by scattered clouds. The inspector's view was
8 perpendicular to the plume and opacities were recorded at the densest
9 part.

10 VI

11 Following the incident just set forth, the train left the dumping
12 area and returned with more molten slag at 9:00 a.m. The inspector
13 again recorded opacity of the smoke in the same manner as before.

14 VII

15 Appellant caused or allowed smoke emissions exceeding 20 percent
16 opacity for 16 1/4 minutes in a one-hour period. Of this, opacity was
17 at 100 percent for a total of one minute, 60 percent for a total of
18 one minute and at no less than 35 percent for the remaining time
19 necessary to exceed a total of three minutes.

20 VIII

21 Generally accepted texts for evaluating opacity agree that 1) the
22 observer's view of an emission must not be obstructed, 2) the sun must
23 be generally at the observer's back, and 3) the observer's line of
24 vision must be approximately perpendicular to the plume direction.

IX

On January 18, 1984, appellant received a Notice and Order of Civil Penalty of \$250 for violation of both Section 9.03(b) of PSAPCA's Regulation I and WAC 173-400-040(1) of the regulations of respondent, State Department of Ecology (DOE). From this appellant filed its Notice of Appeal of February 16, 1984.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Any deviation from generally accepted criteria for evaluating opacity lessens the evidentiary weight of respondent's case. The criteria are not legal standards, every element of which must be proven to sustain a violation. International Paper Co. v. Southwest Air Pollution Control Authority, PCHB Nos. 77-55, 77-84, and 77-94 (1977). Rather, it is a matter of proof. In this matter, the inspector followed the procedure of generally accepted criteria regarding the position of the sun and maintaining a view perpendicular to the plume. (See Findings of Fact V and VIII, above.) The further requirement of an unobstructed view of the emission was met, with the exception of the green chain link fence. While this lessens the evidentiary weight of respondent's case to a minor degree, we conclude that PSAPCA has proven that appellant violated Section 9.03(b) and

1 WAC 173-400-040(1). Each of these prohibits emission of any air
2 contaminant (smoke) of more than 20 percent opacity for a period or
3 periods aggregating more than three minutes in any one hour. Opacity
4 in this instance ranged from 100 percent to no lower than 35 percent
5 for more than three minutes (see Findings of Fact VII, above).

6 II

7 Appellant contends that PSAPCA, a local authority, does not have
8 authority to issue notices of violation or notices of civil penalty
9 based upon state regulation such as WAC 173-400-040(1), here. We
10 disagree. A local authority may enforce state regulations:

11 The [DOE] shall enforce the air quality
12 standards and emission standards throughout the state
13 except where a local authority is enforcing the state
14 regulations or its own regulations which are more
15 stringent than those of the state. (Emphasis
16 added.) RCW 70.94.331(6).

17 Further, RCW 70.94.431 which authorizes the assessment of civil
18 penalties, provides:

19 ...any person who violates any of the provisions of
20 chapter 70.94 or any of the rules and regulations of
21 the department or the board shall incur a penalty in
22 the form of a fine in an amount not to exceed two
23 hundred fifty dollars per day for each violation.
24 (Emphasis added.)

25 Moreover, RCW 70.94.141(3) vests in local authorities the power to:

26 Issue such orders as may be necessary to
27 effectuate the purposes of this chapter and enforce
the same by all appropriate administrative and
judicial proceedings subject to the rights of appeals
as provided in chapter 62, Laws of 1970 ex sess.

These provisions do not limit local authorities to assessment of

1 penalties for violation of only their own regulations.

2 III

3 Appellant contends that Section 9.03(b) of Regulation I and WAC
4 173-400-040(1) make conduct unlawful which the Washington Clean Air
5 Act, chapter 70.94 RCW, does not. Section 9.03(b) of Regulation I
6 provides, in pertinent part:

7 (b) After July 1, 1975, it shall be unlawful for any
8 person to cause or allow the emission of any air
9 contaminant for a period or periods aggregating more
than three (3) minutes in any one hour which is:

10 (1) Darker in shade than that designated as 1
11 (20 percent density) on the Ringelmann Chart as
published by the United State Bureau of Mines; or

12 (2) of such opacity as to obscure an observer's
13 view to a degree equal to or greater than does smoke
in Subsection 9.03(b)(1)....

14 WAC 173-400-040(1) provides, in pertinent part:

15 (1) Visible Emissions. No person shall cause or
16 permit the emission for more than three minutes, in
17 any one hour, of an air contaminant from any
emissions unit which at the emission point or within
a reasonable distance of the emission point exceeds
twenty percent opacity...

18 Appellant cites Kaiser Aluminum v. PCHB, 33 Wn. App. 352 (1982)
19 for the contention that the above rules proscribe conduct which is not
20 made illegal by the statute. We disagree with that contention. See
21 St. Regis Corp. v. PSAPCA and DOE, PCHB No. 82-135 (1983), St. Regis
22 Corp. v. PSAPCA and DOE, PCHB No. 83-175 (1984) and St. Regis Corp. v.
23 PSAPCA and DOE, PCHB No. 83-214 (1984).

24 In Kaiser, supra, the Court of Appeals held:

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-56

1 It is readily apparent that emitting particulate
2 matter into the atmosphere is not proscribed. The
3 law is offended only when the substance emitted has
4 the characteristics of and is emitted for a duration
5 which, together, create a harmful potential.
6 (Emphasis added.)

7 The decision went on to say:

8 Regulation I, Section 9.04, however, provides:

9 SECTION 9.04 PARTICULATE MATTER

10 It shall be unlawful for any person to cause or allow
11 the discharge of particulate matter which becomes
12 deposited upon the real property of others,...

13 On its face, this regulation makes conduct unlawful
14 which the enabling statute does not; the statute
15 simply does not proscribe the mere emission of
16 particulate matter. (Emphasis added.)

17 In proscribing opacity over 20 percent for more than 3 minutes in any
18 one hour, Section 9.03(b) and WAC 173-400-040(1) control emissions
19 with such characteristics (opacity over 20 percent) and for a duration
20 (3 minutes in any one hour) which create a harmful potential. Neither
21 proscribes mere emissions. The rules are consistent with the
22 Washington Clean Air Act, chapter 70.94 RCW.¹

- 23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1. The Washington State Supreme Court has upheld a similar opacity
standard in Sittner v. Seattle, 62 Wn.2d 834, 843, P.2d 859 (1963):

An ordinance to be void for unreasonableness must be plainly and
clearly unreasonable. Although the "opacity" standard may not
detect all of the air contaminants which pollute the air, we
cannot say that it is not a reasonable means by which to detect
some of the contaminating particles which smoke contains. It is
no defense that the "opacity" standard does not regulate all air
contamination but permits some emissions to go unpunished since a
law designed to prevent one evil is not void because it does not
prevent another. Similarly, while it is true that the Ringelmann
Smoke Chart measures coloration and not opacity, it does not

IV

Lastly, appellant invokes the doctrine of collateral estoppel, offensively, to urge that respondent PSAPCA may not be heard concerning consistency of its Section 9.03(b) with the Clean Air Act, chapter 70.94 RCW as discussed at Conclusion of Law III, above. It urges that this is so because that issue was determined adversely to PSAPCA in a prior superior court judgment, Kaiser Aluminum and Chemical Corp. v. PSAPCA, Nos. 251632 and 256239 (Superior Court for Pierce County). The requisites for collateral estoppel are:

Before the doctrine of collateral estoppel can be applied, affirmative answers must be given to the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Lucas v. Velikanje, 2 Wn. App. 888, 894, 471 W.2d 103 (1970).

With regard to requisite number (4), we note that appellant was not a party to the proffered judgment nor was respondent Department of Ecology which has a rule nearly the same as respondent PSAPCA's.

necessarily follow that the chart may not be reasonably used as a basis for determining opacity. The Ringelmann Smoke Chart has been widely accepted throughout the United States as a measurement of air pollution by both legislatures and courts, and we find ourselves in agreement with the wisdom of this acceptance.

1 Moreover, the superior court judgment, on appeal, was affirmed on
2 different grounds (a requirement for scienter) than the judgment is
3 offered for here. Puget Sound Air Pollution Control Agency v.
4 Kaiser, 25 Wn. App 273, 607 P.2d 870 (1980). The interpretation of the
5 Court of Appeals calling for scienter was countermanded by
6 legislation. Chapter 175, Laws of 1980 effective June 12, 1980. The
7 Court of Appeals, on review, did not rule upon the issue for which
8 appellant now offers the superior court judgment, namely the issue
9 discussed at Conclusion of Law III, above.

10 Under these circumstances, we conclude that application of the
11 doctrine of collateral estoppel would work an injustice if applied
12 against PSAPCA. We decline to apply it.

13 V

14 Any Finding of Fact which should be deemed a Conclusion of Law is
15 hereby adopted as such.

16 From these Conclusions of Law the Board enters this
17
18
19
20
21
22
23
24
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-56

ORDER

The \$250 civil penalty is affirmed.

DONE at Lacey, Washington, this 14th day of May, 1984.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

Did not participate in decision
DAVID AKANA, Lawyer Member

Lawrence J. Faulk
LAWRENCE J. FAULK, Vice Chairman

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge